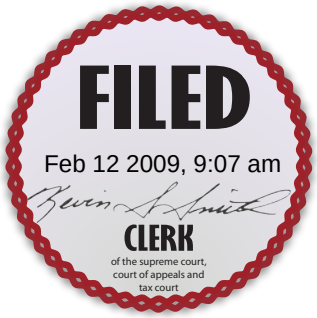

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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH G. ROSS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 22A01-0810-CR-481
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FLOYD SUPERIOR COURT
The Honorable Richard G. Striegel, Senior Judge
Cause No. 22D01-0407-FB-525

February 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Joseph G. Ross appeals the trial court's revocation of probation and order that he serve the remainder of the suspended portion of his eight-year sentence.

We affirm.

ISSUE

Whether the trial court erred when it found Ross violated probation and ordered him to serve the remainder of the previously suspended sentence.

FACTS

On July 22, 2004, the State charged Ross with three counts: burglary, as a class B felony; theft, as a class D felony; and receiving stolen property, as a class D felony. On August 24, 2005, Ross tendered to the trial court his plea agreement with the State whereby he agreed to plead guilty to class B felony burglary; the State agreed to dismiss the two class D felony counts; and Ross would be sentenced to eight years – with seven years suspended to probation. The terms and conditions of probation included that he pay specified court costs and probation user fees, maintain good behavior, and not commit another criminal offense.

On September 26, 2006, the State filed a petition to revoke probation, alleging that Ross had violated probation by being charged with criminal offenses in two separate cases -- 22D01-0608-FB-639 [B-639], and 22D01-0609-FA-699 [A-699[1]] -- and failing to pay probation user fees and court costs. On April 9, 2008, the trial court held the

[1] In A-699, on September 12, 2006, the State charged that Ross committed class A felony robbery resulting in serious bodily injury; class B felony aggravated battery; and class B felony criminal confinement.

evidentiary hearing on the petition to revoke Ross's probation. A witness from the probation department testified that Ross had paid no court costs or probation user fees. Also, Rick Sowders, an officer from the New Albany Police Department, testified to the facts to support the State's charges in B-639 pertaining to an August 7, 2006 burglary of a dwelling.

Detective Steve Bush of the New Albany Police Department testified to his investigation of a vicious beating of Kyle Rager on August 25, 2006, concerning the charges in A-699. Rager reported that while walking in the area of 2800 Charlestown Road, two black males – the shorter one holding a .22 caliber gun – forced him into the backseat of a dark-colored SUV. The shorter man, holding the gun, got into the backseat with Rager and demanded Rager's size 13 Jordan red-and-white athletic shoes. A fight ensued, and the gun fired twice, breaking out the rear passenger window. Rager managed to grab the gun and threw it out the broken window. The vehicle stopped, and Rager got out and ran. Police found a .22 caliber gun in the 2800 block of Charlestown Road, and a blood trail which led to where the shoe-less Rager was picked up and taken to the hospital.

Three days later, the Jeffersonville Police Department reported having in custody two men found in possession of an SUV.[2] Detective Bush noted that the SUV was dark-colored and had a broken-out rear window. He also found blood spatter on the backseat, the back of the driver-side headrest, and the front passenger seat. Also found inside the SUV was a pair of Jordan red-and-white size 13 athletic shoes.

[2] Bush testified that the vehicle had been stolen.

Bush talked to Anton Cousins, identified by a letter inside the SUV. Cousins told Bush that Ross had taken the SUV and appeared later with bloody hands, saying that he had beaten someone up. Bush then talked to Ross, the shorter of the pair, who said that he had been driving the SUV with Cousins as his passenger; Cousins said to pull alongside a man he said he knew; the man got in the SUV; there was an argument over shoes and some gunshots were heard; Ross stopped the SUV, and the man fled. In a second interview, Cousins said that he had been driving the SUV, and Ross told him to pull over for him to speak to a man; the man entered the SUV; Ross and the man began arguing over the man's shoes; there were gunshots; Cousins stopped the SUV, and the man fled. Bush also testified that laboratory tests on samples of the blood spatter taken from inside the SUV indicated the presence of Ross's DNA on the rear of the driver's side headrest and the front passenger seat, along with Rager's blood in the rear of the SUV.

At the conclusion of the hearing, the trial court found that Ross "did violate probation." (Tr. 58). It revoked probation and ordered Ross to serve "the seven year sentence that [was] remaining on" his eight-year sentence. (Tr. 60).

DECISION

Ross asserts that his "sentence was inappropriate under the circumstances," citing our authority to revise a sentence if the "sentence is inappropriate in light of the nature of the offense and the character of the offender." Ross' Br. at 12. He further asserts that "sufficient evidence was not offered at the hearing in this cause that [Ross] committed

another offense," and evidence of his "alleged failure to pay fees/costs . . . was sparse." Ross' Br. at 11, 13-14, 14. We are not persuaded.

The violation of probation is a matter established by the preponderance of the evidence, and when reviewing the trial court's decision to revoke probation, we consider only the evidence most favorable to the judgment. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999). The evidence before the trial court established that Ross had failed to pay probation fees and court costs, both of which were terms of his probation. It further established that Rager had been robbed and beaten; Ross was found in possession of the SUV in which the beating occurred; and Ross was involved in the beating of Rager. This evidence was sufficient to show by a preponderance of the evidence that Ross had violated the law.

By statute, when the trial court "finds that a person has violated a condition [of probation] during the probationary period," the trial court "may . . . order execution of all or part of the sentence that was suspended at the time of the initial sentencing." Ind. Code § 35-38-2-3(g). Hence, the order that Ross serve the entire eight-year sentence executed was within the trial court's authority.

As to Ross' argument that it is "inappropriate" that he serve the eight-year executed sentence, the "appellate evaluation of whether a trial court's sanctions are 'inappropriate in light of the nature of the offender' is not the correct standard to apply when reviewing a trial court's actions in a post-sentence probation violation proceeding. *Jones v. State*, 885 N.E.2d 1286, 1290 (Ind. 2008) (quoting *Prewitt v. State*, 878 N.E.2d 184, 187-88 (Ind.2007)). Further, his assertion to us that "the maximum possible

sentences" are most appropriate for the worst offenders, (Ross' Br. at 12), is inapposite, inasmuch as his eight-year sentence is not the maximum possible sentence. *See* Ind. Code § 35-5-2-5 (sentencing range for B felony offenses 6-20 years). As to his assertion that he "agreed to a sentence for a B felony on the grounds that 7 of the 8 years of the sentence would be suspended," Ross' Br. at 12, such fails to acknowledge that the agreement offered him a significant benefit: the dismissal of two class D felony counts and an opportunity to avoid going to prison. Further, the agreement itself contains the probations terms and conditions of his "good behavior" and "not commit[ting] another criminal offense." (App. 109). Thus, Ross did not honor his agreement.

Ross directs us to conflicts in various testimony by Bush as to what Rager, Cousins, and Ross reported to Bush. He argues that based on this evidence, the record lacks "reliable proof that [he] robbed, battered, and/or confined Kyle Raeger [sic]." Ross' Br. at 13. However, our standard of review requires the matter be "established by the preponderance of the evidence," and that "we consider only the evidence most favorable to the judgment." *Cox*, 706 N.E.2d at 551. The evidence established by the preponderance that during probation, Ross failed to pay court-ordered fees and committed several new criminal acts. Accordingly, we conclude that there is nothing inappropriate about him serving the suspended seven-year sentence.

Our Supreme Court has summarized appellate review of a challenge to the trial court's sentencing order upon the defendant's violation of his probation, as well as the basis for that review standard, as follows:

> Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Once a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed. If this discretion were not afforded to trial courts and sentences were scrutinized too severely on appeal, trial judges might be less inclined to order probation to future defendants. Accordingly, a trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances.

Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007) (internal citations omitted).

Ross was placed on probation after having pleaded guilty and expressly agreed to the terms and conditions of probation. His placement on probation was a matter of grace, and the alternative to serving an executed prison sentence. He failed to comply with the terms and conditions of his probation. We find no abuse of discretion in the trial court's order that he serve his entire eight-year sentence executed.

Affirmed.

VAIDIK, J., concurs.

RILEY, J., concurs in result.